No. 13883

United States
COURT OF APPEALS
for the Ninth Circuit

LESLIE H. CHAPPELL,

Appellant,

vs.

C. D. JOHNSON LUMBER CORPORATION,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

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Appeal from the United States District Court for the District of Oregon.

I. The Longshoremen's & Harbor Workers' Compensation Act is not the exclusive remedy available to appellant.

Appellee first argues that the Longshoremen's & Harbor Workers' Compensation Act is exclusive; that in this particular situation no state can constitutionally pass a compensation statute that would be applicable.

The basis of this contention is that appellant was loading a vessel and such activity automatically excludes the applicability of the "twilight zone" theory.

Nothing appears in the record to indicate that appellant was "loading" a vessel. He was an employee of a lumber mill, receiving the same pay as all laborers at the mill. When he was not working as a spotter, he worked exclusively ashore; when his job was that of a spotter, he was often on shore as well as on the barge (R. 16, 17). As a spotter, at the time of the accident his duty was to set wooden blocks on the barge and keep them straight (R. 7, 18). He did not load the barge or act as a longshoreman in any way.

The Supreme Court of the United States has held:

(1) Employees of a sawmill working exclusively on navigable waters may be regulated by local rules.

> *Sultan Railway & Timber Co. v. Department of Labor & Industries of Washington*
>
> and
>
> *Eclipse Mill Company v. Department of Labor & Industries of Washington.*
>
> 277 U.S. 137, 48 S. Ct. 505, 72 L. Ed. 820.

(2) An employee assisting in dismantling a drawbridge, who was on a barge in navigable waters examining the steel and cutting it into proper lengths, was entitled to the benefits of the state compensation act.

> *Davis v. Department of Labor & Industries,* 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246.

(3) A diver actually engaged in the removal of an obstruction to navigation was considered constitutionally within the purview of the law of an individual state.

> *Millers' Indemnity Underwriters v. Boudreaux* (1926), 270 U.S. 59, 70 L. Ed. 470.

(4) A rigger employed by a shipyard and whose work was on ships, piers and drydocks was injured aboard ship on navigable waters and was permitted to pursue his state remedy.

Moore's Case, 323 Mass. 462, 80 N.E. 2d 478.

(5) A state compensation law was held applicable to a materialman employed by a shipyard pursuant to a maritime contract, injured aboard a ship on navigable waters.

Baskin v. Industrial Accident Commission, et al., 97 Cal. App. 2d 257, 217 P. 2d 733, affirmed 340 U.S. 886, 71 S. Ct. 208, 95 L. Ed. 643.

Appellee has cited no decisions holding that the federal law alone can apply where an employee was engaged in an occupation even remotely similar to that of appellant. A breakdown of the cases cited by appellee is as follows:

Atlantic Transport Co. v. Imbrovek (1914), 234 U.S. 52, 58 L. Ed. 1208;
Southern Pacific Co. v. Jensen (1917), 244 U.S. 205, 61 L. Ed. 1086;
Northern Coal & Dock Co. v. Strand (1928), 278 U.S. 142, 73 L. Ed. 232.

These cases all involve longshoremen.

Employers' Liability Assur. Corp. v. Cook (1930), 281 U.S. 233, 74 L. Ed. 823, involves a claimant whose duties at the time of the accident, as well as at other times, was that of a stevedore or longshoreman.

South Chicago Coal & Dock Co. v. Bassett (1940), 309 U.S. 251, 84 L. Ed. 732, involved only the question of whether the injured party was a seaman.

Nagueira v. New York, N. H. & H. R. Co. (1930), 281 U.S. 128, 74 L. Ed. 754,

and

Pennsylvania Railroad Co. v. O'Rourke (1953), 344 U.S. 334, 97 L. Ed. (Advance p. 262),

are concerned with the applicability of the Longshoremen's & Harbor Workers' Compensation Act as opposed to the Federal Employers' Liability Act.

With the exception of *Pennsylvania Railroad Co. v. O'Rourke,* supra, appellee can cite no case after the date of the decision of *Davis v. Department of Labor & Industries,* supra, wherein the Longshoremen's & Harbor Workers' Compensation Act was held to be exclusively applicable. There just is no such case available. This one exception held that there IS a definite line dividing the respective coverages of the Longshoremen's & Harbor Workers' Compensation Act and the Federal Employers' Liability Act. The Court, at footnote 8 of 97 L. Ed. (Advance p. 267), specifically called attention to the fact that there was an overlapping between state and federal statutes, but not between the two federal statutes.

Appellee cites:

Parker v. Motor Boat Sales (1942), 314 U.S. 244, 86 L. Ed. 184,

and

Western Boat Bldg. Co. v. O'Leary (CA 9, 1952), 198 F. 2d 409,

as authority that the "local concern" doctrine has been abandoned by the Supreme Court of the United States. We submit that the holding in these two cases is merely that so long as the injury occurred on navigable waters

while engaged in a maritime activity, the federal law would be applicable if the injured party sought his remedy therein. In other words, merely because the employment was local in character does not oust the application of the federal law, but if such employment IS of local concern a remedy provided by a state would also be applicable.

> In *Southern Pacific Company v. Jensen,* 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086,

the Court stated the test as follows:

> Does it "work material prejudice to the characteristic features of the general maritime law, or interfere with the proper harmony or general uniformity of that law in its international or interstate relations"? (61 L. Ed. 1098)

> In *Miller's Indemnity Underwriters v. Boudreaux* (1926), 270 U.S. 59, 70 L. Ed. 470,

and cases following, the words used were "local concern" or employment that was "so local in character." Justice Black, in

> *Davis v. Department of Labor & Industries,* 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246,

called it the "twilight zone." We submit that these are different words to describe the same problem and the same result, namely, that if a party is injured on navigable waters in a manner wherein a state law would not interfere with the characteristic features of the general maritime law or if the employment is local in character or if the case falls within the twilight zone, that party may constitutionally seek his remedy among those provided by the individual state.

II. The remedy sought by appellant is a proper one.

Appellee next contends that appellant's only remedy is under the Longshoremen's & Harbor Workers' Compensation Act because he is seeking redress under the State Employers' Liability Act. This is not a true assumption. The complaint is drawn to state a cause of action either under the provisions of the Workmen's Compensation Act of the State of Oregon (Secs. 102-1712, 13, O.C.L.A.) or under the so-called Employers' Liability Act (Sec. 102-1601, et seq., O.C.L.A.).

Appellant's opening brief, pages 21, 22 and 23, contains the discussion of the right of appellant *as given to him by the Workmen's Compensation Act of the State of Oregon* to bring an action against his employer for damages (Section 102-1713, O.C.L.A.). The right given by this portion of the statute to the injured party is the right to sue the employer for common law negligence:

> "Such employer shall be entitled to none of the benefits of this act and shall be liable for injuries to or death of his workman, which shall be occasioned by his negligence, default or wrongful act, as if this act had not been passed." (Sec. 102-1713, O.C.L.A.)

The same section of the Workmen's Compensation Act takes away from the employer the normal defenses available if the action was one given by the common law alone—fellow servant, contributory negligence and assumption of risk.

It cannot be disputed that an injured party may bring an action against his employer by filing a com-

plaint that is based both on common law negligence and on the Oregon Employers' Liability Act.

Thompson v. Union Fishermen's Co-op. Packing Company, 118 Or. 463, 273 Pac. 953,

involved the question of whether plaintiff was bringing an action for the death of a child as an administratrix under the common law or as a beneficiary under the Employers' Liability Act. The Court, at page 465, upon a rehearing of the question stated:

> "While there are allegations in this complaint charging a violation of the Employers' Liability Act, there are other allegations charging a violation of a common-law duty, and hence it cannot as a matter of law be said that the right of action arose under the Employers' Liability Act and not under Section 380. *Under the issues made by the pleadings, whether the action should have been brought under one or the other of said statutes, presents a question of fact for the jury and not a question of law for the court.*" (Emphasis added)

To the same effect see

Montgomery Ward & Co. v. Hammer, 38 F. 2d 636,

where this court held that the defendant could not object to the trial court's instructing only on the Employers' Liability Act, but that the plaintiff might very well have had proper grounds for claiming that both common law negligence and Employers' Liability Act negligence should be submitted to the jury.

Hoffman v. Broadway Hazelwood, 139 Or. 519, 10 P. 2d 349, 11 P. 2d 814.

In the above case the lower court submitted to the jury the question of whether or not a bakery employee's

work involved risk and danger within the Employers' Liability Act and then further instructed that there was not sufficient evidence to prove common-law liability. On appeal the Supreme Court of Oregon held that this was an improper instruction and that as a matter of law the Employers' Liability Act was inapplicable, but that the court should have instructed regarding the rules of the common law (p. 526).

See also:

Fretti v. Southern Pacific Company, 154 Or. 97, 57 P. 2d 1280.

There is only one portion of appellant's whole complaint that tends to bring the action within the purview of the Oregon Employers' Liability Act. This is subsection 7 of paragraph IV (R. 9). All other allegations of negligence and all other portions of the complaint charge "negligence, default or wrongful acts," as Section 102-1713, O.C.L.A., in the Workmen's Compensation Act of the State of Oregon permits.

In claiming that, first, appellant could not proceed under a state compensation act at all, and second, that appellant is proceeding under a state employers' liability act, appellee refuses to face the legal fact that appellant IS proceeding under the provisions of the State Compensation Law. Three pages of appellant's brief set forth this argument, and nothing on this issue was cited by appellee to counter the argument.

Even assuming that this action was based exclusively on the Employers' Liability Act of Oregon (if the only allegation of negligence was subsection 7 of paragraph

IV) (R. 9), the granting of the motion for summary judgment would still be erroneous for appellant may seek his remedy among the laws provided by the state if workmen's compensation proceedings could validly be provided by the state.

Appellee's brief, at page 21, states:

> "Recovery through workmen's compensation proceedings was a condition upon the limited encroachment by states into the federal maritime jurisdiction within the lines drawn by the Jensen case."

We know of no such authority. We know of no authority that holds that state workmen's compensation laws may encroach further on federal maritime jurisdiction than other state legislation. Appellee is asking the court to substitute the word "is" for three words, "may validly be", so that the statute would then read

> "and if recovery for the disability or death through workmen's compensation proceedings IS not provided by state law."

This connotes a far different reading than the statute as it actually exists, which reads:

> "and if recovery for the disability or death through workmen's compensation proceedings MAY NOT VALIDLY BE provided by state law." (33 U.S.C.A., § 903a.)

The statute can only mean what it says. If recovery through workmen's compensation proceedings may not validly be provided, then, and only then, is the federal act exclusively applicable.

III. Appellee failed to comply with the provisions of the Longshoremen's & Harbor Workers' Compensation Act.

Appellee contends that appellant must allege failure to secure compensation by appellee before he can proceed against his employer, as provided in 33 U.S.C.A., 905, which reads:

> "The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admirality on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

So there would be no misunderstanding, appellant assures this court that at the time the complaint was originally filed there was not the slighest intention of proceeding under this section of the Longshoremen's & Harbor Workers' Compensation Act, or any part thereof.

The injury occurred on November 22, 1950 (R. 7). The complaint was filed on September 7, 1951 (R. 12). The first time the Longshormen's & Harbor Workers'

Compensation Act was mentioned was on September 23, 1952, almost two years from the date of the injury and more than one year from the time the complaint was filed. Appellee attempts to intimate that the only reason this point was not raised previously was that the deposition of appellant was not taken until September 2, 1952. However, there was absolutely nothing in the deposition on this issue that is not contained in the complaint (R. 23, 6).

The issue before this Court is whether a motion for summary judgment can properly be granted. Rule 56 (c) states:

> ". . . the judgment sought shall be rendered forthwith if the *pleadings, depositions,* and *admissions* on file, together with the *affidavits,* if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Emphasis added)

As argued in appellant's brief, pages 6 and 14, the affidavit (R. 16) shows noncompliance by the employer. Appellee does not contend that any portion of the Longshoremen's & Harbor Workers' Act was complied with, but only that appellant did not allege noncompliance. Appellee is in the position of

(1) Admitting the Workmen's Compensation Law of Oregon was rejected so that appellant could not avail himself of any compensation benefits thereunder;

(2) Stating that appellant's sole and proper remedy is within the Longshoremen's & Harbor Workers' Compensation Act, even though no attempt has been made to pay such compensation (Title 33, U.S.C.A. 914 (a))

or notify this employee or other employees that compensation was available (33 U.S.C.A 934).

Appellee cites three cases at page 22 of its brief to the effect that the injured party must plead the terms of the Longshoremen's & Harbor Workers' Compensation Act. None of these cases even remotely involves this legislation, but they are concerned with other completely foreign statutes.

Appellee also cites *Gladden v. Stockard S. S. Co.*, 184 F. 2d 510, 512, to the same effect. This case holds plaintiff must assert and prove noncompliance.

Appellant contends that his affidavit (R. 16) does assert noncompliance by appellee in every particular within his knowledge. The complaint sets forth an action at law for damages as permitted by 33 U.S.C.A. 905. This is the same action at law for damages permitted by the Oregon Workmen's Compensation Law under the conditions existing in this matter (Sec. 102-1713, O.C.L.A.).

CONCLUSION

(1) The Longshoremen's & Harbor Workers' Act is not the exclusive remedy available to a laborer who is employed by a sawmill.

As stated in *Norton v. Warren Company,* 321 U.S. 565, 88 L. Ed. 931, 936.

"The Senate report makes clear that 'the purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen." These men are mainly

employed in loading, unloading, refitting, and repairing ships.' S. Rep. No. 973, 69th Cong., 1st Sess. page 16."

Appellant was not a longshoreman in any sense or use of the word.

(2) There was in existence in Oregon a state workmens' compensation act whose remedies were available to the appellant.

Since appellee chose not to contribute a percentage of the payroll to the industrial accident fund, this compensation law makes appellee liable in damages for its negligent conduct if the injured party chooses to bring an action.

(3) The only records before the Court show that there is at least a "genuine issue" of whether or not appellee complied with the Longshoremen's & Harbor Workers' Compensation Act so as to avoid liability; and since this genuine issue exists, the granting of a motion for summary judgment was erroneous.

Respectfully submitted,

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